Filed 4/9/19 P. v. Sinclair CA4/1

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. LUE JAMES SINCLAIR, Defendant and Appellant.	D073786 (Super. Ct. No. SCD273226)

APPEAL from a judgment of the Superior Court of San Diego County, Melinda J. Lasater, Judge. Affirmed.

Robert L.S. Angres, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Eric A. Swenson and Allison V. Acosta, Deputy Attorneys General, for Plaintiff and Respondent.

Lue James Sinclair and his codefendant Shaun Gray violently beat Adam M., repeatedly punching and kicking him in the face and upper body. The incident was

witnessed by several other persons and was recorded by a video surveillance camera. The victim testified at the preliminary hearing but left the United States prior to trial. The jury convicted Sinclair of assault by means likely to produce great bodily injury and false imprisonment and acquitted him on two other counts (assault with a deadly weapon and making a criminal threat).

Sinclair contends the court violated his constitutional right to confrontation by admitting Adam's preliminary hearing testimony at trial. He asserts the court erred in finding that the prosecution exercised due diligence in trying to secure the victim's presence. He further argues the error was prejudicial because this was a close case, as demonstrated by his acquittal on two of four criminal counts.

We conclude Sinclair's confrontation rights were not violated by the admission of the victim's preliminary hearing testimony at trial. The prosecution exercised due diligence under the circumstances and, even if the prosecution failed to exercise due diligence, any error was harmless beyond a reasonable doubt.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Victim's Preliminary Hearing Testimony*

At a preliminary hearing, subject to cross-examination, Adam testified that on the morning of August 18, 2017, he had finished his morning prayers and was standing outside on a sidewalk. He was wearing a traditional Middle Eastern scarf over his head. A car drove past him and stopped. Sinclair got out of the car in a threatening manner. Sinclair had attacked him once before. Sinclair looked directly at Adam and put on his gloves to let Adam know he was going to fight him.

Adam turned his back on Sinclair to walk away. As he started to move away, Sinclair yelled to Gray who was standing across the street. Sinclair followed Adam and shouted to Gray, "hey, cut him off." Gray came at him. Gray was holding a white stick in a threatening manner and told Adam he was "not getting away." Adam tried talking to Gray, saying he was just minding his own business. The men said, "we don't care," and "there's no getting away today." Sinclair and Gray each started beating Adam at the same time.

Gray hit Adam with the stick. From his experience in boxing, Adam took protective measures by placing his arms in front of his body at a 90-degree angle covering his face and chest. Adam said he was being hit by two people and did not know who was doing what. He was being punched and kicked in his face, chest, and legs at the same time. Because Sinclair was on his right side, Adam assumed Sinclair caused the injuries on that side of his face. After Adam fell and scraped his head on the pavement, the men continued to kick him.

At some point during the incident (the timing of which is not clear in the record), Sinclair told Adam that he would kill him and put him in a box if Adam came back "around here." Adam clarified that he understood the threat to mean that if Sinclair ever saw him again, Sinclair would kill him.

After Sinclair and Gray beat him up, Adam stood up and started to walk away. Gray left. Sinclair followed Adam saying, "take that to your holy war" and yelling insults at him. Adam said to Sinclair, "May God have mercy on you." At that moment, a police officer came and called for backup. The officers apprehended Sinclair and Gray.

Adam did not request any medical attention but was in pain for approximately three weeks after the incident. There were visible bruises on his head and internal bruises across his entire chest and stomach. He still had pain from internal bruising on the left side of his rib cage.

B. *Due Diligence Hearing*

On November 30, 2017, Adam was personally served with a subpoena to appear for trial on January 24, 2018. When Adam did not appear for trial on January 24, 2018, the court issued and held a bench warrant.[1]

The prosecution filed an opposed motion to deem Adam unavailable under Evidence Code section 240, subdivision (a)(5), and to allow his preliminary hearing testimony to be read to the jury. The prosecutor filed a declaration outlining his due diligence efforts, and a process server and investigator with the district attorney's office testified at the hearing on February 5, 2018 (prior to the commencement of trial). The following facts were presented for the court's consideration.

A process server with the district attorney's office personally served Adam with a subpoena on November 30, 2017. Adam did not mention any plans to leave the country.

On December 7, 2017, Adam telephoned the district attorney's office and informed the prosecutor that he planned to leave the country on January 3, 2018.[2] The prosecutor did not release Adam from his subpoena, but instead told Adam the trial was expected to

---

1 Trial was rescheduled to February 1, 2018, and then to February 5, 2018.

2 The parties stipulated to this fact.

go forward and they "should stay in touch in the near future." When the prosecutor had not heard from Adam, he left a message for him on December 29, 2017.

On January 1, 2018, Adam purchased a one-way ticket to depart the country on January 3. The prosecutor and investigator contacted Adam on January 3, 2018. Adam acknowledged he had received a subpoena to appear at trial. He described his plans to leave the country, stating he was relocating to Indonesia and was leaving that evening. Adam said he was moving to Indonesia because he was a Muslim and did not feel safe in San Diego.

The prosecutor and investigator told Adam that he was not released from the subpoena and was still obligated to appear at court. Adam said he was still relocating and would return to San Diego at some point to resolve some personal matters but would not provide an exact date. Adam said he would not be able to return for the trial and did not want to do so. The investigator and prosecutor explained to Adam that if he disregarded the subpoena, a bench warrant could be issued for his arrest. The investigator testified Adam appeared to understand the consequences of failing to appear.

Since January 3, 2018, the People tried to call Adam several times at a number previously used to reach him, but their efforts were unsuccessful. On January 30, the investigator e-mailed Adam with information about the new trial date and to find out whether Adam would be back in San Diego to participate in the trial. As of February 5, Adam had not responded to the e-mail.

The investigator acknowledged he did not ask Adam for his new address in Indonesia, cell phone number, or a contact telephone number. They had agreed the best

way to contact Adam was by e-mail. The investigator did not ask Adam whether he was staying with family members in Indonesia or had family members in San Diego, and did not contact the Indonesian government for assistance in locating him.

The prosecution argued the People met their burden to show due diligence, which required only a showing of reasonable efforts and did not mean they had to exhaust every means to secure the victim's presence. The prosecutor and investigator explained to the victim that a bench warrant could be issued for him. When the victim did not appear on January 24, a bench warrant was issued and held. The prosecutor said advising Adam that a bench warrant could be issued was more reasonable than taking the victim of a crime into custody.

The defense argued the prosecution knew for more than a month that Adam planned to leave the country on January 3. There were options to secure the witness's testimony other than holding him in custody. The prosecution did not inform the defense that the witness would not be present at trial, which would have allowed the defense to make other arrangements to protect Sinclair's confrontation rights.

The court found that the People used due diligence to obtain the witness's presence and permitted the use of the preliminary hearing transcript at trial. The court reasoned that although a conditional examination may have been the better approach, there was no case law requiring the People to set a conditional examination once they had notice that a witness "intends to be gone or not be available for trial." Similarly, there was no case law requiring the prosecution to ask a witness to post bond or take the witness into custody to secure his testimony at trial. The court noted it was "particularly interesting

that the ticket was purchased on January 1st [and] it is not uncommon to have people say they have plans to do something and then not follow through with them." The court concluded the People did what they were required to do when it became clear the victim was following through with his plans to leave—they made it very clear to the witness that if he did not appear, a bench warrant could be issued for his arrest.

C. *Trial Evidence*

At trial, the victim's testimony at the preliminary hearing was read for the jury, as summarized *ante*. The jury viewed a surveillance video of the incident. Bruce S., who was across the street at the time of the incident, testified he saw two men converge on a third man. The third man had a scarf on his head and was walking on the sidewalk. Bruce identified the two men in court as Sinclair and Gray. One of the two men, he could not tell who, was making disparaging remarks to the victim. Sinclair knocked the victim to the ground and began punching him, while Gray was kicking the victim and stomping on his head.

Estefan Z. testified he was driving when he noticed a commotion. He saw Sinclair using his closed fists to punch the victim in the upper body. Sinclair was wearing black gloves and did not have anything in his hands. Sinclair threw the victim against a car. The victim bounced off the car and fell to the ground. While Sinclair was punching the victim, Gray ran over, stomped on the victim's head twice, and kicked it like he was trying to make a field goal. The victim did not fight back and was trying to get away.

Jeremiah J. said he saw Gray kicking and stomping on the victim, and Sinclair punch, kick, and stomp on him. The victim did not fight back.

Sinclair testified in his own defense. He said a woman told him that Adam was making her and other women uncomfortable. Sinclair approached Adam and said he wanted to talk with him. Adam ignored him. Sinclair called out to Gray for assistance. As Sinclair approached, Adam pivoted like he was going to hit him. Sinclair said he quickly struck Adam with one or two punches. Adam fell away from him. Sinclair's "next impression" was that Adam was attacking Gray. Sinclair tried to separate the two men and threw three to five punches to "put [Adam] down." He denied kicking Adam or using any kind of weapon. When the prosecutor played the portion of the surveillance video showing him kicking Adam, Sinclair said he was "using his thigh" but that was not kicking.

During Sinclair's cross-examination, the prosecutor received a note saying Adam had responded to the investigator's email. Adam was in Northern California and would be able to appear in court the following week. The court asked defense counsel whether they wanted Adam to testify in person. Counsel said it placed the defense "between a rock and a hard place" because all their trial preparations and strategy were based on the witness's unavailability and use of the preliminary hearing transcript. Counsel declined to have the witness brought in, stating the current circumstances underscored the prosecution's lack of diligence in securing the witness's presence at trial.

D. *Charges, Verdict, and Sentence*

Sinclair was tried on charges of assault with a deadly weapon (Pen. Code, § 245, subd. (a)(1)),[3] assault by means likely to produce great bodily injury (§ 245, subd. (a)(4)), making a criminal threat (§ 422), and false imprisonment by violence, menace, fraud, or deceit (§ 236, 237, subd. (a)).

The jury convicted Sinclair of assault by means likely to produce great bodily injury and false imprisonment, but acquitted him on charges of assault with a deadly weapon and making a criminal threat. The court sentenced Sinclair to five years in prison.

DISCUSSION

Sinclair argues the court violated his Sixth Amendment right to confront witnesses against him when it admitted Adam's preliminary hearing testimony after the prosecution failed to use due diligence to secure his presence at trial. Sinclair further asserts the error was not harmless.

The People assert the prosecution exercised due diligence in trying to secure Adam's presence at trial—by informing Adam he was not released from his subpoena and if he did not appear, a warrant could be issued for his arrest—and any error was harmless given the strength of the other evidence presented at trial. The People further contend Sinclair waived his argument on appeal under the doctrine of invited error by declining to have Adam testify at trial after he returned to California.

---

3 All further statutory references are to the Penal Code unless otherwise indicated.

A. *Confrontation Clause, Legal Principles, and Standard of Review*

"The confrontation clauses of both the federal and state Constitutions guarantee a criminal defendant the right to confront the prosecution's witnesses. (U.S. Const., 6th Amend.; Cal. Const., art. I, § 15.) That right is not absolute, however. An exception exists when a witness is unavailable and, at a previous court proceeding against the same defendant, has given testimony that was subject to cross-examination. Under federal constitutional law, such testimony is admissible if the prosecution shows it made 'a good-faith effort' to obtain the presence of the witness at trial. [Citations.] California allows introduction of the witness's prior recorded testimony if the prosecution has used 'reasonable diligence' (often referred to as due diligence) in its unsuccessful efforts to locate the missing witness. (Evid. Code, § 240, subd. (a)(5).)" (*People v. Cromer* (2001) 24 Cal.4th 889, 892 (*Cromer*); *People v. Smith* (2003) 30 Cal.4th 581, 609 [the federal constitutional requirement of good faith effort is " 'in harmony' " with the state reasonable diligence requirement].)[4]

---

4 Evidence Code section 1291, subdivision (a)(2) codifies an exception to the hearsay rule and provides that "former testimony," such as preliminary hearing testimony, does not constitute inadmissible hearsay if "the declarant is unavailable as a witness" and "[t]he party against whom the former testimony is offered was a party to the action or proceeding in which the testimony was given and had the right and opportunity to cross-examine the declarant with an interest and motive similar to that which he has at the hearing." A witness is unavailable if he or she is "[a]bsent from the hearing and the proponent of his or her statement has exercised reasonable diligence but has been unable to procure his or her attendance by the court's process." (Evid. Code, § 240, subd. (a)(5).) "[W]hen the requirements of [Evidence Code] section 1291 are met, the admission of former testimony in evidence does not violate a defendant's constitutional right of confrontation." (*People v. Herrera* (2010) 49 Cal.4th 613, 621 (*Herrera*).)

To establish a witness's unavailability, "the prosecution must show that its efforts to locate and produce a witness for trial were reasonable under the circumstances presented." (*Herrera*, *supra*, 49 Cal.4th at p. 623.) "Considerations relevant to the due diligence inquiry 'include the timeliness of the search, the importance of the proffered testimony, and whether leads of the witness's possible location were competently explored.' " (*Id*. at p. 622.) "The prosecution is not required 'to keep "periodic tabs" on every material witness in a criminal case' " or take preventative measures to stop a witness from disappearing "absent knowledge of a 'substantial risk that [an] important witness would flee.' " (*People v. Wilson* (2005) 36 Cal.4th 309, 342 (*Wilson*).)

"While we 'defer to the trial court's determination of the historical facts of what the prosecution did to locate an absent witness,' we 'independently review whether those efforts amount to reasonable diligence sufficient to sustain a finding of unavailability.' " (*People v. Thomas* (2011) 51 Cal.4th 449, 503 (*Thomas*).)

B. *The Prosecution Established Due Diligence*

We conclude the prosecution exercised due diligence to procure Adam's testimony at trial. Adam testified at the preliminary hearing in September 2017, and there is nothing in the record to suggest he was uncooperative or intended to leave the country for an extended period at that time. In November 2017, he was personally served with a subpoena, requiring him to testify at the January 24, 2018 trial. He did not inform the process server that he planned to leave the country. Service of the subpoena clearly put Adam on notice that he was obligated to appear and testify at trial.

Adam first informed the prosecution that he wanted to leave the country on December 7, 2017. But as the trial court noted, a witness's plans can and often do change. "The prosecution is not required 'to keep 'periodic tabs' on every material witness in a criminal case.' " (*Wilson*, *supra*, 36 Cal.4th at p. 341.) Here, it was not unreasonable to conclude Adam would reconsider or delay his plans—particularly where the prosecution repeatedly admonished him that the subpoena was not withdrawn and he was still obligated to appear at trial. The prosecutor informed Adam of the need to remain in contact. When he did not hear from Adam, the prosecutor called the witness on December 29—still weeks before trial was scheduled—but the prosecutor was unsuccessful in reaching him. The prosecutor left a message for Adam.

It was not until January 1, 2018 that Adam purchased his one-way ticket. Adam forwarded a copy of his flight information to the prosecution sometime between January 1 and January 3, when he spoke to the prosecutor for the first time following the December 7 telephone conversation and the prosecutor's December 29 voice mail. During the January 3 conversation, the prosecutor and an investigator both reiterated that Adam was obligated to comply with the trial subpoena. Adam acknowledged again he was aware of the consequences, but he ultimately informed the prosecution that he was leaving later that evening.

Based on these circumstances—where a subpoena was timely issued; the witness was initially cooperative but later suggested he wanted to leave the country at a future date; the prosecution repeatedly informed the witness he was obligated to appear at trial and a bench warrant could be issued if he failed to appear; the witness initially

acknowledged he was aware of his obligations; and the witness then notified the prosecutor he was proceeding with his plans and was scheduled to depart hours later—we conclude the prosecution's efforts to secure the witness's testimony were reasonably diligent.

Sinclair contends the prosecution was on notice that Adam would leave the country as early as December 7, and there were additional steps that could have been taken to secure the witness's appearance at trial. Sinclair faults the prosecution for failing to obtain "precise contact information"; failing to require Adam to submit to a conditional examination; failing to seek his detention as a material witness under section 1332;[5] and failing to "ensure his presence through cooperation with federal authorities or by means of any treaty obligations." Although Sinclair is correct that other avenues could have

---

5 In relevant part, section 1332 provides: "(a) . . . [W]hen the court is satisfied, by proof on oath, that there is good cause to believe that any material witness for the prosecution or defense, whether the witness is an adult or a minor, will not appear and testify unless security is required, at any proceeding in connection with any criminal prosecution . . . the court may order the witness to enter into a written undertaking to the effect that he or she will appear and testify at the time and place ordered by the court or that he or she will forfeit an amount the court deems proper. [¶] (b) If the witness required to enter into an undertaking to appear and testify, either with or without sureties, refuses compliance with the order for that purpose, the court may commit the witness, if an adult, to the custody of the sheriff . . . until the witness complies or is legally discharged. [¶] (c) When a person is committed pursuant to this section, he or she is entitled to an automatic review of the order requiring a written undertaking and the order committing the person, by a judge or magistrate having jurisdiction over the offense other than the one who issued the order. This review shall be held not later than two days from the time of the original order of commitment. [¶] (d) If it is determined that the witness must remain in custody, the witness is entitled to a review of that order after 10 days." (§ 1332, subds. (a)-(d).) Taking a material witness who has committed no crime into custody for the sole purpose of ensuring the witness's appearance at a trial is disfavored. (*People v. Cogswell* (2010) 48 Cal.4th 467, 477-478.)

been pursued, "[t]he prosecution must do what is reasonable under the circumstances, not necessarily everything that can be suggested in hindsight." (*People v. Sanchez* (2016) 63 Cal.4th 411, 442.) "That additional efforts might have been made or other lines of inquiry pursued does not affect" a finding of due diligence. (*People v. Cummings* (1993) 4 Cal.4th 1233, 1298, overruled on another ground in *People v. Merritt* (2017) 2 Cal.5th 819, 830-831; see also *People v. Hovey* (1988) 44 Cal.3d 543, 564 (*Hovey*) ["it is unclear what effective and reasonable controls the People could impose upon a witness who plans to leave the state, or simply 'disappear,' long before a trial date is set"].)

Sinclair cites *People v. Roldan* (2012) 205 Cal.App.4th 969 for the principle that the prosecution was required to secure the witness's presence at trial once they learned he might leave. Citing *People v. Louis* (1986) 42 Cal.3d 969, Sinclair similarly contends due diligence requires prosecution "efforts to ensure that a witness does not become absent." We disagree that *Roldan* and *Louis* support Sinclair's position here. Both cases stand for the principle that the prosecution must take reasonable measures to prevent a witness from fleeing if (1) the prosecution *knows* (2) there is a *substantial risk* (3) that a *crucial witness* will flee. (See *People v. Friend* (2009) 47 Cal.4th 1, 68 (*Friend*) ["We have also stated that when there is knowledge of ' "a substantial risk" ' that an ' "important witness would flee," ' the prosecutor is required to ' "take adequate preventative measures" to stop the witness from disappearing.' "]; *Hovey*, *supra*, 44 Cal.3d at p. 564 ["In *Louis*, *supra*, [42 Cal.3d at pp. 989-991], we held that if a particular witness's testimony is deemed 'critical' or 'vital' to the prosecution's case, the People must take reasonable precautions to prevent the witness from disappearing."].)

In *Roldan*, the defendant was sentenced to life in prison for a pair of shootings of rival gang members. (*Roldan*, *supra*, 205 Cal.App.4th at p. 973.) The prosecution knew the federal government was going to deport the witness at issue (a victim to the shooting) even before the preliminary hearing occurred. (*Id*. at p. 976.) The witness had completed his sentence for a probation violation but was not released when his sentence ended. Instead, he was held for nine months until the preliminary hearing and then promptly deported. The prosecutor stated " 'We were holding [the witness] at the preliminary hearing because we knew he was subject to deportation.' " (*Ibid*.) As previously noted, the same type of concrete knowledge, risk and advance notice were not present here. *Roldan* also relied on *Louis* to support its position that the prosecution may have to prevent a witness from becoming absent.[6] But as we next discuss, *Louis* was based on unique facts and does not support a finding that the prosecution failed to exercise due diligence here.

In *Louis*, the absent witness's preliminary hearing testimony was the sole evidence from an eyewitness identifying the defendant as the shooter in a murder trial. (*Louis*, *supra*, 42 Cal.3d at p. 989.) The witness was already in custody on felony charges. (*Id*. at pp. 977, 990.) The People agreed to let this critical eyewitness out of custody on his own recognizance for a weekend in the middle of trial even though the prosecutor

---

6 In finding the prosecution did not exercise due diligence, the court in *Roldan* quoted *Louis*, stating the prosecution must use reasonable means " '"to prevent a present witness from becoming absent." ' " (*Roldan*, *supra*, 205 Cal.App.4th at p. 980, italics omitted, quoting *Louis*, *supra*, 42 Cal.3d at p. 991.)

admitted, " 'In my mind there was a very real possibility that the man would boogie, that he wouldn't show up. . . . I thought there was a real risk that he would not.' " (*Id*. at p. 992.) The witness "promptly disappeared." (*Id*. at p. 978.) In addition, the prosecutor may have failed to prevent the witness's disappearance as a result of more than "mere indifference"—because the prosecutor actually "hoped that [the witness] would disappear" so that the prosecutor could read the witness's testimony rather than present live testimony from a "witness whose credibility was indisputably minimal." (*Id*. at pp. 974, 993, fn. 7.) Based on these circumstances, the Supreme Court concluded the prosecution failed to exercise due diligence to prevent the witness from becoming absent. (*Id*. at pp. 989-993.) As the Supreme Court itself later noted, "[s]ubsequent cases have limited the holding in *Louis* to its peculiar facts." (*Thomas, supra,* 51 Cal.4th at p. 502.)

The witness here did not present the same type of substantial flight risk as *Louis* and the prosecution did not have the same amount of clear, advance notice that the witness would leave the country as in *Roldan*. (See *Friend, supra,* 47 Cal.4th at p. 69 ["The fact that [the absent witness] had missed one hearing date did not create a substantial risk that he would permanently disappear."].) Even if we assume Adam's plans to leave San Diego were sufficiently concrete in early December 2017, he was not a crucial or vital witness. (Compare *Roldan, supra,* 205 Cal.App.4th at p. 980, fn. 3 [other than absent witness's preliminary hearing testimony "there was no direct evidence implicating [defendant] as the person who shot him"; the remaining evidence was "circumstantial and minimal"]; *Louis, supra,* 42 Cal.3d at p. 991 ["Tolbert was a critical prosecution witness, and was known to be both unreliable and of suspect credibility—the

very type of witness that requires, but is likely not to appear to submit to, cross-examination before a jury."].) As we discuss *post*, Adam was not the sole witness to the crime; his testimony was largely cumulative as there were several eyewitnesses, and a video surveillance camera captured the incident. We agree with Sinclair that the prosecution should have notified defense counsel sooner, but we do not believe the prosecution's actions as a whole were "desultory and indifferent." (*People v. Mendieta* (1986) 185 Cal.App.3d 1032, 1039.)

In summary, because the prosecution made good faith efforts and exercised due diligence in securing the victim's appearance, the trial court did not err in allowing the prosecution to read the victim's preliminary hearing testimony at trial.

C. *Any Error in Admitting the Preliminary Hearing Testimony Was Harmless*

Even if the prosecutor failed to exercise due diligence in procuring the victim's appearance at trial, any error was harmless beyond a reasonable doubt. Confrontation clause violations are subject to the test for prejudice found in *Chapman v. California* (1967) 386 U.S. 18. " ' "We ask whether it is clear beyond a reasonable doubt that a rational jury would have reached the same verdict absent the error." ' " (*People v. Bryant, Smith and Wheeler* (2014) 60 Cal.4th 335, 395.)

"To determine whether a confrontation clause violation is harmless beyond a reasonable doubt, courts consider 'the importance of the witness'[s] testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength

of the prosecution's case.' " (*People v. Foy* (2016) 245 Cal.App.4th 328, 351, quoting *Del. v. Van Arsdall* (1986) 475 U.S. 673, 684.)

Here, the prosecution's case rested on much more than the victim's testimony—it included video surveillance footage, three eyewitnesses, and the defendant's own admissions and incredible statements. The video recording—which was played for the jury multiple times—shows Sinclair striking and kicking Adam. Three eyewitnesses, who were not involved in the incident and knew none of the parties involved, identified Sinclair as one of the perpetrators of the crime. Each witness explained how Sinclair hit and kicked the victim. They further testified that after Adam fell to the ground, he tried to get up but could not because Sinclair and Gray were striking and kicking him and stomping on his head. The eyewitnesses further testified that Adam did not fight back and was just protecting himself. Sinclair admitted that he struck Adam at least twice initially and again four or five times, offering only weak and inconsistent explanations for his actions. The strength of the prosecution's case was overwhelming even without Adam's preliminary hearing testimony.[7]

We are not persuaded by Sinclair's argument that reversal is required because the jury acquitted him on two of the four counts: assault with a deadly weapon and making a criminal threat. If anything, Sinclair likely benefited from the victim's absence since the three eyewitnesses gave conflicting accounts about the use of the alleged deadly weapon,

---

7 In fact, the victim twice testified at the preliminary hearing that he was unsure of certain aspects of the beating and noted that the video would reflect what happened.

a stick, and they did not hear the alleged criminal threat.[8] Adam could testify about, and likely clarify, both of these issues to bolster the prosecution's case on the acquitted charges. Indeed, Sinclair had the opportunity to call Adam as a witness once he returned to California if he believed his testimony was needed. He made a strategic decision not to do so—instead attempting to establish, in Adam's absence, that Sinclair acted in self-defense. In any event, the prosecution's case on the charges on which Sinclair was convicted was strong even without Adam's preliminary hearing testimony.

We therefore conclude any error in admitting Adam's preliminary hearing testimony was harmless beyond a reasonable doubt. (*Chapman*, *supra*, 386 U.S. at p. 24.)[9]

---

8 There was no evidence to show that Sinclair was holding a stick or any other weapon. (§ 245, subd. (a)(1).) The prosecution's theory was that Sinclair aided and abetted Gray in committing assault with a deadly weapon. Although the record shows that Sinclair addressed Adam in a demeaning and derogatory manner, no witness reported hearing him make any unconditional, immediate, and specific threat to kill or cause great bodily injury to Adam. (§ 422.)

9 Because we reach the merits of Sinclair's claims and conclude there was no confrontation clause error and any error was harmless, we do not address the People's alternative argument based on the doctrine of invited error.

DISPOSITION

The judgment is affirmed.

GUERRERO, J.

WE CONCUR:

BENKE, Acting P. J.

HUFFMAN, J.